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Supreme Court, U.S.
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No. 03-____

IN THE

Supreme Court of the United States

Sabate S.A. and Sabate U.S.A., Inc.,
Petitioners,

v.

Chateau des Charmes Wines Ltd.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Peter L. Vestal
David C. Winton
Daniel J. Geraldi
SEQUOIA LAW GROUP, LLP
333 Sacramento St.
San Francisco, CA 94111

Thomas C. Goldstein
(Counsel of Record)
Amy Howe
GOLDSTEIN & HOWE, P.C.
4607 Asbury Pl., NW
Washington, DC 20016
(202) 237-7543

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QUESTION PRESENTED

Whether the United Nations Convention on Contracts for the International Sale of Goods invalidates terms set forth in a commercial invoice or letter of confirmation without regard to the practices of the parties or trade usages.

RULE 29.6 STATEMENT

The successor to petitioner Sabate S.A. by merger and subsequent change of name is Oeneo S.A. Petitioner Sabate U.S.A., Inc. is a wholly owned subsidiary of Oeneo S.A.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-6a) is reported at 328 F.3d 528. The opinion of the district court (App., *infra*, 7a-18a) is unpublished.

JURISDICTION

The court of appeals' judgment was entered on May 5, 2003. A timely petition for rehearing en banc was denied on June 26, 2003 (App., *infra*, 19a-20a). This court has jurisdiction pursuant to 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the United Nations Convention on Contracts for the International Sale of Goods, 15 U.S.C. App. (Pub. Notice 1004), are reproduced at App., *infra*, 21a-23a.

STATEMENT

This case presents fundamental questions regarding the construction of the single most important treaty governing the sale of goods in international commerce. The United States and more than sixty other countries, representing more than two-thirds of all world trade valued at trillions of dollars each year, have ratified the United Nations Convention on Contracts for the International Sale of Goods (CISG). See 15 U.S.C. App. (Pub. Notice 1004). This case presents a basic question regarding a frequently recurring scenario under the CISG: when an order for goods is followed by a written invoice or letter of confirmation, are standard terms and conditions set forth in the invoice or confirmation nonetheless invalid? That question in turn raises the most fundamental and frequently recurring interpretative question under the Convention: is a contract (here, the order) limited to its

express terms or instead construed in light of trade usages and all the facts and circumstances of the parties' relationship?

In this case, respondent placed oral orders from petitioners[1] for more than a million wine closures. Petitioners in turn transmitted numerous invoices for the sales, which respondent paid. But the Ninth Circuit held as a matter of law that the existence of an initial oral agreement invalidated any material terms subsequently set forth in the invoices notwithstanding trade usage or the circumstances of the parties' relationship. The courts of numerous other CISG signatories have considered the question – including major trading partners such as France and Germany – and reached the opposite result, and thus would enforce the terms of the invoices in this case. The decision below also conflicts with the interpretation of the CISG by other U.S. courts, for the Eleventh Circuit and district courts have rejected the Ninth Circuit's formalistic approach to contract interpretation. Certiorari should be granted to fulfill the CISG's principal purpose of establishing "uniform rules which govern contracts for the international sale of goods" (CISG pmbl.) in order to eliminate "legal uncertainty" (Letter of Secretary of State Schultz Submitting the CISG to President Reagan (Aug. 30, 1983)).

1. This case involves the sale of goods between parties in France, Canada, and the United States, all of which are CISG signatories. Petitioners (a French company and its U.S. marketing subsidiary) manufacture and sell cork closures for bottled wine. Respondent (a Canadian company) produces and sells wine. In 2000, respondent placed two oral orders with petitioners for more than one million wine closures. Over the course of thirteen months, petitioners sent ten batches of closures and eleven invoices. Respondent in turn paid petitioners. Each of the invoices contained a prominently displayed forum-selection clause on the front, as

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[1] For simplicity, this petition will use the term "petitioners" throughout.

well as an instruction to see the reverse side of the invoice, which also contained a forum-selection clause. The parties' oral discussions addressed the number of closures, the price, and the shipment schedules, but not how any dispute would be resolved. Respondent never objected to any term of the invoices.

In 2001, respondent sued petitioners in federal district court in California alleging that the closures were "defective, unmerchantable, and unfit for the purposes" for which they were sold. Compl. ¶ 9. Respondent asserted, *inter alia*, a claim for breach of contract based on the parties' "oral agreements, supported by written invoices." *Id.* ¶ 52. Petitioners moved to dismiss the case as filed in the improper forum in light of the invoices' provision (as translated from French to English) that "[a]ny dispute arising under the present contract is under the sole jurisdiction of the Court of Commerce of the City of Perpignan" in France.

2. The district court agreed with petitioners and dismissed the case. Pet. App. 7a, 17a-18a. The court held that the dispute was governed by U.S. law, under which "[i]t is well-established that a non-negotiated forum selection clause included in a form contract may be enforced even if it was not the subject of bargaining." *Id.* 11a (citing *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585 (1991)). In any event, in light of the numerous invoices sent by petitioners to which respondent had never objected, the court found that "evidence of plaintiff's prior course of dealing with defendants establishes plaintiff's consent to the forum selection clause." *Id.* 12a.

On respondent's appeal, the Ninth Circuit reversed, holding that "the forum selection clauses * * * were not part of any agreement between the parties." Pet. App. 2a. The court of appeals recognized that under domestic law (specifically, under Article 2 of the Uniform Commercial Code) the parties did not reach an agreement until it was memorialized in the written invoices. *Id.* 5a n.3. But it held

that a different result was called for by the CISG, which governed the case because the contracts called for an international sale of goods and the parties were citizens of signatory nations. *Id.* 3a-4a. Further, the panel held, the CISG governed the question of when the contracts were formed. *Id.* 5a.

According to the Ninth Circuit, each oral order between petitioners and respondent formed a "complete and binding contract[]," for the parties addressed "the kind of cork, the quantity, and the price." Pet. App. 5a. The court of appeals found it dispositive that the oral agreements "did not include any forum selection clause," which the CISG deems a "'material[]'" term. *Id.* (quoting CISG art. 19(3)). Because respondent "merely performed its obligations under the oral contract," without affirmatively assenting to the additional material terms of the invoices, those terms were invalid. *Id.* 6a.

3. After the Ninth Circuit denied rehearing and rehearing *en banc*, this petition followed.

REASONS FOR GRANTING THE WRIT

The U.N. Convention on Contracts for the International Sale of Goods governs, as its name implies, contracts for the sale of goods in international trade between citizens of signatory states. CISG art. 1. The CISG sets forth, *inter alia*, standards for evaluating contract formation, modification, and interpretation. See, *e.g.*, *id.* arts. 14, 18, 29. In this case, the Ninth Circuit seriously misconstrued the Convention by holding as a matter of law that, if a contract has been formed, any material terms set forth in a subsequent invoice or letter of confirmation are invalid. On a proper construction of the CISG, the forum-selection clause in petitioners' invoices was valid because it formed a part of the parties' course of dealing. At the very least, petitioners were entitled to make a factual showing that such clauses were common in trade usage. The court of appeals' contrary holding conflicts with a

well-developed and thoroughly reasoned body of case law in other CISG signatory states, as well as the United States.

I. The Ninth Circuit Erred in Holding that the CISG Governs The Enforceability of the Forum-Selection Clauses in Petitioners' Invoices.

The Ninth Circuit's holding that the forum-selection clauses set forth in petitioners' invoices were unenforceable under the CISG because they were not included in the initial oral agreement between petitioners and respondent, and its further holding that respondent's failure to object to those clauses did not constitute acceptance, failed to account for Article 4(a) of the CISG. That Article provides that the Convention does not address "the validity of [a] contract or of any of its provisions or of any usage." Those matters are resolved by reference to *domestic* law rather than the CISG. See Harry M. Flechtner, *The U.N. Sales Convention (CISG) and MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova d'Agostino, S.P.A.: The Eleventh Circuit Weighs in on Interpretation, Subjective Intent, Procedural Limits to the Convention's Scope, and the Parol Evidence Rule*, 18 J.L. & Com. 259, 286 (1999). In this case, respondent contends that it is not bound by the forum-selection clauses because the invoices are invalid. Under Article 4 of CISG, that question of validity must be resolved according to U.S. domestic law.

Based on Article 4, the tribunals of other CISG signatories would hold that the validity of a writing containing a forum-selection clause is a question of domestic law. That was the holding of the court in *Inta S.A.* v. *MCS Officina Meccanica S.p.A.*, No. 45626 (Arg. Oct. 14, 1993). See Michael J. Bonell & Fabio Liguori, *The U.N. Convention on the International Sale of Goods: A Critical Analysis of Current International Case Law - 1997 (Part I)*, 2 Unif. L. Rev. 385 (1997). Similarly, the Dutch courts have held that the enforceability of a confirmation letter, including a forum-selection clause it contains, falls outside the purview of the CISG and is therefore a question of domestic law.

Handelskwekerij Aartsen BV v. *G. Suykens*, No. 1242 HAZA 95-934 (Zutphen (Neth.) May 29, 1997) (applying domestic law rather than CISG and finding forum-selection clause valid when "the parties already did business several times with each other in 1993, in which [one party] confirmed in writing to [the other party] the purchase agreements that had occurred orally").

Pursuant to Article 4, the forum-selection clause in this case is enforceable as a matter of U.S. law on either of two grounds. The Ninth Circuit recognized that under U.S. law the invoices would be enforced because U.S. law would require the contracts in this case to be in writing. Pet. App. 5a n.3. Alternatively, as the district court recognized, "[f]orum selection clauses are presumptively valid and will be enforced unless the party opposing the clause can 'clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching.'" Pet. App. 10a (quoting *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972)). The same rule applies to other dispute-resolution provisions such as arbitration clauses. See *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985).

In these respects, the Ninth Circuit's decision specifically conflicts with this Court's decision in *Mitsubishi Motors* and the Seventh Circuit's decision in *In re Oil Spill by Amoco Cadiz*, 659 F.2d 789, 795 (1981), both of which emphasized the particular importance of enforcing forum-selection clauses in international contracts. In *Mitsubishi Motors*, this Court rejected the respondent's argument that its antitrust claims against petitioner were not arbitrable, notwithstanding that an arbitration clause was part of the parties' agreement. In so holding, this Court explained that its conclusion was compelled by its "concern of international comity, respect for the capacity of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes * * * *even assuming that a contrary result would be forthcoming in a*

domestic context." 473 U.S. at 629 (emphasis added).

In *Amoco Cadiz*, a case arising out of ultimately unsuccessful efforts to prevent a massive oil spill, pursuant to which the parties had entered into a standard salvage agreement that included an arbitration clause, the court rejected the plaintiffs' argument that certain tort claims were not arbitrable absent a specific provision to that effect. The court similarly rejected the plaintiffs' argument that some claims were not arbitrable because they fell outside the temporal scope of the salvage agreement. The court explained that its "finding in favor of arbitration was bolstered by," *inter alia*, "the special deference owed to forum-selection clauses in international contracts." 659 F.2d at 795.

II. Even Assuming that the Validity of the Forum-Selection Clauses Is Governed By CISG, the Ninth Circuit's Holding Is Contrary to the Convention and Should Be Reviewed in This Court.

The Ninth Circuit's decision is erroneous even if, contrary to Article 4, the validity of petitioners' invoices were determined under the CISG. The court of appeals held that the contract in this case was limited to the specific terms of the parties' oral discussions. That holding conflicts with the text of the Convention, the views of the leading commentators, decisions from other signatory states, and U.S. case law.

A. The Decision Below Is Contrary to the Plain Text and the Understanding of the Leading CISG Commentators.

Contrary to the Ninth Circuit's decision in this case, the drafters and signatories of the CISG eschewed a formalistic approach to interpreting and enforcing contracts. The "dominant theme of the [CISG] is the role of the contract construed in light of commercial practice and usage." John O. Honnold, Uniform Law for International Sales Under the

1980 United Nations Convention 3 (3d ed. 1999). The Convention thus repeatedly specifies that the parties' agreement must be considered in light of "*all* relevant circumstances of the case including the negotiations, *any* practices which the parties have established between themselves, usages and *any* subsequent conduct of the parties." CISG art. 8(3) (emphases added). See also *id.* art. 9(1) ("The parties are bound by *any* usage to which they have agreed and by *any* practices which they have established between themselves." (emphases added)); *id.* art. 9(2) ("The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.").

Further, the terms of the contract are not limited to those explicitly or implicitly incorporated in the parties' initial agreement. Rather, the contract is subject to modification, including by payment of an invoice that sets forth particular terms. Although "[s]ilence or inactivity does not *in itself* amount to acceptance" of an offer or additional material term, "if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price * * * the acceptance is effective at the moment the act is performed." CISG art. 18 (emphasis added).

The Ninth Circuit nonetheless deemed it dispositive that a forum selection clause is a "material" term of a contract (Pet. App. 5a), which cannot be deemed accepted by mere "silence or inactivity" (CISG art. 18(1)). But as just noted, Article 18 specifically provides that "payment of the price" *is* sufficient to incorporate a material term. Professor Peter Schlechtriem

– perhaps the world's foremost authority on the CISG[2] – wrote in a report based on his contemporaneous notes of the Convention's drafting that "[e]xamples of such acts – which are considered equivalent to acceptance and thus mean that a contract is concluded – are the shipment of goods or payment of the price." Peter Schlechtriem, Uniform Sales Law – The UN-Convention on Contracts for the International Sale of Goods 53 (1986). The "practices" of the parties thus "can include the effect of silence to a confirmation letter as assent to a conclusion or modification of the contract included in the letter." Michael Esser, *Commercial Letters of Confirmation in International Trade: Austrian, French, German and Swiss Law and Uniform Law under the 1980 Sales Convention*, 18 Ga. J. Int'l & Comp. L. 427, 449 (1988).

The fact that a forum-selection clause is a "material" term is thus "subject to an important clarification" that the Ninth Circuit ignored: "The Convention provides that the parties are considered * * * to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed, by parties to contracts of the type involved in the particular trade concerned." Kazuaki Sono, *Formation of International Contracts Under the Vienna Convention: A Shift Above the Comparative Law*, *in* International Sale of Goods: Dubrovnik Lectures 111, 126 (Petar Sarcevic & Paul Volken, eds., 1986). As the Secretariat Commentary – described by the Institute for International Commercial Law as "perhaps the most authoritative source one can cite" regarding the CISG – sets forth with respect to Article 18: silence or inactivity "can constitute acceptance" if "coupled with other factors which

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[2] The views of respected commentators such as these are given significant weight in international law generally and in interpretation of the CISG in particular. See Sunil R. Harjani, *The Convention on Contracts for the International Sale of Goods in United States Courts*, 23 Hous. J. Int'l L. 49, 61 (2000).

give sufficient assurance that the silence [or inactivity] of the offeree is an indication of assent," including on the basis of "any practices which the parties have established between themselves, usages, and any subsequent conduct of the parties." Commentary on the Draft Convention on Contracts for the International Sale of Goods Prepared by the Secretariat, U.N. Doc. A/Conf. 97/5, art. 16 [draft counterpart of CISG art. 18] ¶ 4 [hereinafter "Secretariat Commentary"], *reprinted in* Pace University Law School CISG Database.

Further, as Professor Kelso has explained, the "materiality" provision of Article 19 on which the Ninth Circuit rested its decision merely establishes a "*presumption* of materiality" that can be overcome in light of "the parties' intentions, previous practices and trade usages." J. Clark Kelso, Note, *The United Nations Convention on Contracts for the International Sale of Goods: Contract Formation and the Battle of the Forms*, 21 Colum. J. Transnat'l L. 529 (1983) (emphasis added). As Professor Schlechtriem explains, the presumption may be overcome: "given the special circumstances of the case, as well as party customs, negotiations, or usages, differences between offer and acceptance, even related to these points, may be considered as immaterial." Schlechtriem, *supra*, at 54 n.181.

B. Petitioners Would Prevail in the Tribunals of Other CISG Signatory States.

The Ninth Circuit's decision conflicts with the rulings of courts in other states that subscribe to the CISG and that faithfully apply the Convention's text and the drafters' intent. Prior to the decision in this case, it was settled that the material terms of a letter of confirmation or invoice, if not objected to, were incorporated into the parties' agreement. Foreign tribunals reached that conclusion because it is an accepted trade practice or usage to follow oral orders with invoices and confirmation letters. Thus, in *W.T. GmbH* v. *P. AG*, No. P4 1991/238 (ZG Basel, Switz. Dec. 21, 1992), the court held that under the CISG a subsequent confirmation

letter was binding with respect to a material term – the parties to the agreement – because "the letters of confirmation must have constituted a practice that the parties had established between themselves in the sense of Article 9(1) CISG" and, "[h]ad the defendant, after receipt of the confirmation letter of 24 February 1989, wished to have been understood by the [seller] to be in fact not a contractual partner but rather an agent, she would have had to inform the [seller] of this at that moment." And in No. 1 U69/92 (Oberlandesgericht Saarbrücken (Ger.) Jan. 13, 1993), the seller sent the buyer a confirmation letter that, as in this case, addressed the question of dispute resolution – there, the obligation to give prompt notice of any defects. The court held that the buyer agreed to the confirmation letter when it accepted the goods.

In *E.H.T.M. Peters* v. *Kulmbacher Spinnerei & Co. Produktions KG*, No. 456/95/He ('s Hertogenbosch Ct. App. (Neth.) Apr. 24, 1996), a seller sought to enforce general "terms and conditions" set forth on its "order confirmations" governing material terms such as interest and the place of delivery. The court held that these provisions were binding under the CISG because the parties had previously done business together "on a small scale" and the purchaser was therefore understood to be "aware of the fact that the [seller] used these general terms and conditions, [of] which [the purchaser] could have been aware from their context."

Even if a foreign tribunal did not find it dispositive that respondent paid without objection the eleven invoices in which petitioners had expressly included a forum-selection clause, it would at least remand for a determination whether the use of a forum-selection clause constitutes an accepted trade practice, whether generally or in the wine industry in particular. Thus, in No. 2 Ob 191/98x (Oberster Gerichtshof Oct. 15, 1998), Austria's highest court remanded for a determination whether trade usages applied to the parties' contract – there, usages in the timber trade – holding that "trade usages agreed between the parties, any practices established between the parties, as well as customs generally

known and observed in international trade prevail over the provisions of the CISG."

C. The Ninth Circuit's Opinion Conflicts With the Interpretations of the CISG By Other U.S. Courts.

Just as important, the decision below creates a conflict in U.S. authority regarding the interpretation of contracts governed by the CISG. As in this case, in *MCC-Marble Ceramic Center, Inc.* v. *Ceramica Nuova D'Agostino, S.P.A.*, 144 F.3d 1384 (CA11 1998), cert. denied, 526 U.S. 1087 (1999), the parties reached an oral agreement, then the seller executed an invoice governing the terms of dispute resolution, but the buyer claimed not to be bound by the invoice. The cases differ in that the buyer signed the invoice. But the legal issue resolved by the Eleventh Circuit was very similar, and its holding is irreconcilable with the Ninth Circuit's decision in this case. The Eleventh Circuit held that under the CISG the "intent of the parties" had to be resolved by giving "'due consideration * * * to all relevant circumstances of the case.'" *Id.* at 1389. In particular, "because [CISG] article 8 requires a court to consider any 'practices which the parties have established between themselves, usages and any subsequent conduct of the parties' in interpreting contracts * * * whether the parties intended to adhere to the ten day limit for complaints, as stated on the reverse of the initial contract, will have an impact on whether MCC was bound" by the invoice. *Id.* at 1392. Of particular note, as commentators have recognized, the Eleventh Circuit's decision "resisted the temptation to look to domestic case law and instead based its entire findings on the language contained in Article 8(1) and Article 8(3) of the CISG," as supported by "'the great weight of academic commentary,'" in order to further "the overriding need for uniformity and consistency in the interpretation of the CISG." Harjani, *supra*, at 1390 (quoting *MCC-Marble*, 144 F.3d at 1390).

Similarly, as in this case, in *Filanto, S.p.A.* v. *Chilewich Int'l Corp.*, 789 F. Supp. 1229 (S.D.N.Y. 1992), one party (there, the buyer) sent a memorandum agreement that included a term regarding dispute resolution. The seller did not object for several months. To the contrary, as in this case, the seller affirmatively invoked the later document in its breach of contract suit. The court held that the memorandum agreement was binding, finding "no satisfactory explanation as to why [the seller] failed to object to the [memorandum agreement] in a timely fashion." *Id.* at 1240. The court in *Filanto* recognized that mere silence is not acceptance under the CISG, but it correctly held that "the Court may consider previous relations between the parties in assessing whether a party's conduct constituted acceptance." *Id.* Cf. *Magellan Int'l Corp.* v. *Salzgitter Handel GmbH*, 76 F. Supp. 2d 919, 925 (N.D. Ill. 1999) (buyer can assent to terms "through a statement made by or other conduct of the offeree").

III. The Ninth Circuit's Opinion Poses a Significant Threat to International Commerce.

The foregoing establishes that the Ninth Circuit committed a grave error of law in this case and created an important conflict regarding the construction of the CISG. The court of appeals held that once a contract has been formed (here, each of the oral agreements between petitioners and respondent), any additional material terms (here, the forum-selection clauses of petitioners' invoices) are categorically invalid. It makes no difference, under the Ninth Circuit's holding, that the forum-selection clauses were included in *numerous* separate invoices received and paid by respondent over the course of thirteen months, or that each invoice contained a prominently displayed forum-selection clause on the front of the invoice as well as an instruction to see the reverse side of the invoice. The district court properly found that respondent's "prior course of dealing with [petitioners] establishes [respondent's] consent to the forum selection clause." Indeed, respondent's own complaint

asserts a claim for breach of contract based on the "oral agreements, *supported by written invoices*." Pet. App. 11a (emphasis added). The court of appeals nevertheless reversed on the legal ground that, notwithstanding the express language of Article 18 of the CISG, payment of invoices is the equivalent of "silence," which is insufficient to signify acceptance. It furthermore makes no difference, under the Ninth Circuit's rule, that forum-selection clauses are routinely employed in international sales contracts generally, and the wine closure industry specifically, as petitioners would have shown had the court of appeals at least remanded the case for further proceedings.

The Ninth Circuit's erroneous construction of the CISG governs a significant number of cases because the factual circumstances of this case frequently recur. As this case illustrates, the practice of placing oral orders for goods is commonplace. Although oral discussions may (as in this case) address the minimum terms necessary to form a contract, experience demonstrates that such discussions rarely address every possible material term. The court of appeals' ruling furthermore governs not merely oral agreements but *any* contract that is followed by one party's articulation of a significant term. The decision below thus supplants the entire body of international commercial law governing the classic "battle of the forms" with an unsound and unwarranted *per se* rule.

Even limited to its narrowest possible application, the Ninth Circuit's decision will adversely affect completed and prospective contractual arrangements in a vast number of cases. This case specifically governs contract terms addressed to "the settlement of disputes" (Pet. App. 5a (quoting CISG art. 19(3))), which principally involve forum selection and the choice of arbitration over litigation. It is well settled under both U.S. and international commercial law that such terms are valid and enforceable, including when set forth in form documents such as invoices. See Pet. App. 11a-12a (citing *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585

(1991); *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1 (1972)); *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Handelskwekerij Aartsen BV* v. *G. Suykens*, No. 1242 HAZA 95-934 (Zutphen (Neth.) Dist. Ct. May 29, 1997) ("Choosing a forum by applicability declaration in general terms and conditions for order confirmations is a form which is customary in international trade."). Importantly, such terms are almost never addressed by the contracting parties in oral discussions. Rather, as in this case, they are set forth in subsequent documents.

The widespread international acceptance and use of forum-selection and arbitration clauses are further important evidence that the Ninth Circuit's decision contravenes the intent of the signatories of the CISG. There is no evidence in the text or drafting history of any intent to so substantially depart from accepted means of contract formation and interpretation. To the contrary, there is every reason to believe that the CISG embodies the recognition that forum-selection clauses are "an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction," such that refusal to enforce them would "damage the fabric of international commerce and trade." *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 516-17 (1974).

The Ninth Circuit's holding that the CISG invalidates dispute-resolution clauses in invoices and letters of confirmation furthermore deprives contracting parties of a valuable tool for managing disputes and reducing their costs. This Court has repeatedly acknowledged the utility of forum-selection clauses in eliminating the uncertainty regarding both the "law applicable to the resolution of disputes arising out of the contract" – disputes that will "almost inevitably exist with respect to any contract touching two or more countries, each with its own substantive laws and conflict-of-laws rules" (*Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 516 (1974)); and the fora in which such disputes may be brought (*Carnival*

Cruise Lines, Inc. v. *Shute*, 499 U.S. 585, 593 (1991) (noting that "[i]ncluding a reasonable forum clause in a form contract of this kind well may be permissible" because the cruise line could otherwise be "subject[ed] * * * to litigation in several different fora")).

Moreover, the effects of the Ninth Circuit's opinion extend beyond forum-selection clauses, as it creates the possibility that virtually all pre-printed terms and conditions commonly appearing on millions of invoices used in trade worldwide will be deemed invalid. Such terms and conditions may govern not only forum selection, but also other important terms of the transaction, such as warranties, payment terms, notice of defect provisions, arbitration clauses, retention of title provisions, non-conforming product return terms, shipping terms and conventions, the passing of risk, and insurance. As a result of the Ninth Circuit's opinion, unless international merchants spell out each and every term in their telephone calls or get signed, written contracts in every case, they can no longer rely on pre-printed terms and conditions appearing on invoices.

The Ninth Circuit's central geographic role in international trade further heightens the significance of its decision. The western states are a substantial source of international trade with Mexico, Canada, and the Pacific Rim. The decision below thus subjects tens of billions of dollars in trade to an erroneous and disruptive standard that deprives a contracting party of an important and accepted means of arranging for cost-effective means of dispute resolution.

Certiorari accordingly should be granted.

CONCLUSION

For the foregoing reasons, certiorari should be granted.

Respectfully submitted,

Peter L. Vestal
David C. Winton
Daniel J. Geraldi
SEQUOIA LAW GROUP, LLP
333 Sacramento St.
San Francisco, CA 94111

Thomas C. Goldstein
(Counsel of Record)
Amy Howe
GOLDSTEIN & HOWE, P.C.
4607 Asbury Place, N.W.
Washington, DC 20016
(202)237-7543

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